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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

XAVIER T.,

Petitioner,

v.

THE SUPERIOR COURT OF MERCED
COUNTY,

Respondent;

MERCED COUNTY HUMAN SERVICES
AGENCY,

Real Party in Interest.

F079025

(Super. Ct. Nos. 17JP-00044-A,
17JP-00044-B)

OPINION

THE COURT*

ORIGINAL PROCEEDINGS; petition for extraordinary writ review. Donald J. Proietti, Judge.

X.T., in pro. per., for Petitioner.

No appearance for Respondent.

James N. Fincher, County Counsel, and Jennifer Trimble, Deputy County Counsel, for Real Party in Interest.

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* Before Levy, Acting P.J., Peña, J. and DeSantos, J.

Xavier T. (father), in propria persona, seeks an extraordinary writ from the juvenile court's orders issued at a contested 18-month review hearing terminating reunification services and setting a Welfare and Institutions Code section 366.26 hearing¹ as to his sons, Anthony F., Jr., and Eliseo T., now seven and four years old, respectively. Xavier contends the Merced County Human Services Agency (agency) abused its discretion in not advancing visitation to overnight visits and the court erred in not returning the children to his custody. We deny the petition.

PROCEDURAL AND FACTUAL SUMMARY

On April 28, 2017, the agency removed then five-year-old Anthony F., Jr., and two-year-old Eliseo T. from the custody of their mother Ramona R. (mother) after she was arrested for making criminal threats, gang enhancements and child endangerment. The police notified the agency after responding to a report that gang members at mother's house threatened to shoot up the neighborhood and yelled "Norte" after a neighbor complained about loud music coming from mother's house in the early morning. Officers obtained a warrant to search the house for gang indicia or firearms and found it unsuitable for young children. The agency took the children into protective custody and filed a dependency petition on their behalf.

Mother denied being a gang member even though she had been documented as a validated active member of the Norteno gang. She identified Anthony F., Sr., as Anthony Jr.'s biological father and Xavier as Eliseo's biological father. Xavier was a validated and known Norteno gang member, although he denied being active in the gang. Anthony, Sr., was also an active member of the Norteno gang but claimed he did not affiliate. Apart from paying child support, Anthony F., Sr., was not involved in his son's life. Xavier, however, played a parental role for both children and established a strong

¹ Statutory references are to the Welfare and Institutions Code.

relationship with Anthony, Jr., over the years. Xavier separated from mother in February 2017 but remained involved with the children and successfully co-parented them with her.

Eliseo had Marfan syndrome, a rare, progressive and potentially fatal genetic disorder that affects the body's connective tissue, which comprises and supports the skin, blood vessels, bones and other organs and predisposed him to other conditions, involving the heart, eyes and bones. A chest X-ray completed in August 2017 revealed Eliseo already had signs of scoliosis indicated by a 32 percent curvature of the spine, which was reportedly severe for his age. He also had pectus excavatum, a congenital deformity of the chest in which the sternum and rib cage grow abnormally, and arachnodactyly, also known as "spider fingers," in which the fingers and toes grow abnormally long.

In June 2017, the juvenile court adjudged the children dependents (§ 300, subds. (b) and (g)) and removed them from parental custody. The court found Xavier was Eliseo's presumed father and ordered reunification services for him and mother for both children. Mother's services plan required her to comply with the terms and conditions of her probation, participate in individual counseling, complete a nurturing parenting book and participate in the "All Moms Matter" support group upon her release from custody. Xavier's services plan required him to participate in the "All Dads Matter" support group, complete a drug and alcohol assessment and recommended treatment, submit to random drug testing and comply with the terms of his probation. The court also ordered weekly supervised visitation and granted the agency discretion to advance to unsupervised visitation. The court denied Anthony, Sr., reunification services under section 361.5, subdivisions (b)(10) and (e)(1). The agency placed the children in the foster home of Stephanie R. and Ryan C. (the foster parents).

By December 2017, mother and Xavier were out of custody and living together. Mother was pregnant with their second child and Xavier was employed full time. They

were compliant with their probation and regularly visited the children. However, neither was fully compliant with their individual services plan. Mother was participating in a one-year parenting class required by probation, but she was not participating in individual counseling. Xavier tested positive for methamphetamine in September 2017 by hair follicle analysis and subsequently refused to submit a hair sample.

Meanwhile, the foster parents wanted to adopt the children, despite Eliseo's special medical needs and Anthony, Jr.'s behavioral problems, which emerged around the time he started school. Anthony, Jr., shook his head and neck a lot, which was difficult for him to stop. He also spun around in circles. He urinated in his pants on several occasions at school and in the evening at home. Stephanie found his underwear soiled with urine hidden in his room. As a result, the social worker referred him for counseling services.

At the six-month review hearing in December 2017, the juvenile court continued reunification services to the 12-month review hearing, which it scheduled for May 16, 2018. Two days after the hearing, Xavier tested positive for cocaine by hair follicle analysis.

In January 2018, Eliseo's cardiologist discovered he had a mitral valve prolapse with severe mitral valve regurgitation in addition to other heart complications and scheduled him for diagnostic imaging.

In early May 2018, mother gave birth to a son, I.T., who was detained by the agency.

In its report for the 12-month review hearing, the agency reported mother and Xavier remained compliant with the terms of their probation and made progress in their services plan. Mother completed a nurturing class and made satisfactory progress in individual counseling but completed only 10 of 52 parenting classes required by probation. Xavier made progress in that he began alcohol and drug treatment in late

March 2018, however, he continued to test positive for drugs. He and mother regularly visited the children but had difficulty expressing their feelings and demonstrating their affection for them. The agency recommended the court find a substantial probability the children would be returned to parental custody and continue services to the 18-month review hearing.

The day before the 12-month review hearing, the foster parents filed a request for de facto status. On the day of the hearing, mother requested a contested hearing after the juvenile court expressed concern she had only completed 10 parenting classes. The court set a hearing on the de facto parent request for June 7 and a contested 12-month review hearing for August 7.

Meanwhile, the foster parents filed a letter, informing the juvenile court they loved the children and considered them part of the family. As a family, they engaged in weekly fun nights, saw movies, played at the arcades and went to the zoo, park, museums, sports games, library and beach. Eliseo was under the care of a cardiologist and orthopedic surgeon who gave him a back brace to slow the progression of his scoliosis and delay spinal surgery. Because he had pain in his feet and legs and had difficulty walking, the surgeon also gave him braces for his feet and referred him for physical and occupational therapy. At the beginning of 2018, his care was transferred to Stanford's Marfan Clinic. A cardiologist there determined his heart condition was more severe than previously known and plans were made to surgically repair his prolapsed mitral valve and partially correct his pectus excavatum. When he entered their home, he was speaking in two-word, unintelligible sentences. The foster parents arranged to have him assessed through the school district and, as a result, he was found eligible for speech and language services.

On June 1, 2018, mother was arrested for a probation violation after she was terminated from her parenting class for disruptive and aggressive behavior. She was released from custody five days later after appearing in court.

On August 7, 2018, the juvenile court conducted the 12-month review hearing. By this time, mother and Xavier were separated. Mother was residing with MaryAnn, the paternal great grandmother, in a three-bedroom trailer home. After mother submitted on the agency's recommendation, the court found there was a substantial probability the children would be returned to parental custody by the 18-month review hearing which it set for October 11, 2018, and ordered that services continue. The court ordered I.T. returned to mother's custody with family maintenance services.

On September 24, 2018, Eliseo underwent a mitral valve repair and was hospitalized for four days. The social worker arranged for one parent to stay in the hospital room overnight with him while he was hospitalized, but mother and Xavier left two hours after surgery and stayed with Xavier's grandfather. The foster parents stayed with Eliseo during his hospital stay. On the day of Eliseo's discharge, the hospital staff conducted a voluntary CPR class and encouraged all family members to attend. The foster parents participated in the class. Mother and Xavier did not.

In its report for the 18-month review hearing, the agency recommended the juvenile court terminate reunification services. It did not believe the parents understood the seriousness of the children's needs and were more concerned about themselves. As an example, they moved to Stanislaus County in September 2018 and had their probation cases transferred there even though neither was employed or had a driver's license. As a result, their ability to participate in Eliseo's medical appointments and provide stability to the children was restricted. Though the parents regularly visited the children, visitation remained supervised and they were not readily affectionate with the children or expressive of their feelings for them.

The 18-month review hearing was continued and conducted as a contested hearing beginning in January 2019. Meanwhile, Anthony, Sr., filed a modification petition (§ 388, subd. (a)) requesting reunification services. The court scheduled a hearing on Anthony, Sr.'s section 388 petition on the date set for the contested 18-month review hearing (review/388 hearing).

In February 2019, the juvenile court began hearing testimony in the contested review/388 hearing. The court denied Anthony, Sr.'s section 388 petition during the initial phase of the hearing. The issue during the review phase of the hearing centered on whether mother and Xavier could meet the special needs of their children or whether it would be detrimental to the children to be returned to their custody. Mother and Xavier took the position the agency failed to show it would be detrimental to return the children and asked the court to place them in their custody under family maintenance.

Mother testified Eliseo was diagnosed with Marfan syndrome in 2016 at the age of two. She had him evaluated after noticing he had a "hole in his chest." She understood Marfan syndrome was associated with his tissues and muscles and his stature ("tall and skinny"). Before he was detained, she took him to the cardiologist every six months and administered his medication. He received braces for his feet and back after he was removed from her. She understood the importance of physical therapy to his condition and began participating in his physical therapy sessions in April 2018 after she was given permission. She also participated in his occupational therapy sessions. She did not believe Anthony, Jr., had any special needs or emotional, behavioral problems.

Asked why she did not spend the night at the hospital after Eliseo's surgery, mother explained the room was small and Stephanie slept on the one couch in the room and she was more comfortable sleeping in her car. She asked but was unsuccessful in having another couch put in the room for her to sleep on. She did not ask Stephanie to sleep elsewhere, knowing she was not allowed to be alone with Eliseo. Mother testified

she was unaware there was going to be a CPR class on the day of Eliseo's discharge until she saw Stephanie leave the room to attend. On her own, she obtained a CPR certification in January 2019.

As to services, mother testified she lacked 14 classes to complete the 52-week parenting class. She learned how to discipline her children and express her feelings for them. She attended every visit with the children except one when she was in the process of moving.

Social worker Eliza Hernandez testified the agency opposed returning the children to mother because she had limited understanding of Anthony, Jr.'s emotional needs and Eliseo's medical needs and she was concerned about mother's ability to properly respond in a medical emergency. In addition, she did not believe Anthony, Jr., was bonded to her. He was not bonded when he was removed from her custody and though they worked with mother to develop a bond, Hernandez saw no sign of affection during the approximately 20 visits she observed. The agency's concern about Xavier was that he was not drug testing and had not completed a parenting class. He was asked to test on February 5, 2019, but he did not report to the testing facility.

On cross-examination by minors' counsel, Hernandez described a visit she observed between the children and mother and Xavier on March 6, 2019. The children hid so they could surprise their parents when they arrived. Mother and Xavier found the children when they arrived with I.T. The children were excited, and they hugged each other. The family also hugged and kissed at the end of the visit. During the visit, the mother and Xavier appropriately interacted with the children by redirecting them and demonstrated caring by taking them to the bathroom, feeding them nutritious food and giving them a fruit drink instead of soda. Mother also checked Eliseo's blood pressure three times. Asked how the children felt about their baby brother, Hernandez said they

loved him but interacted minimally with him. They got excited when they saw him crawl or laugh.

Xavier testified, as had mother, that their relationship was not romantic. They were living together to take care of the children. He denied he and mother were Norteno gang members, stating he was a “dropout.” He enrolled in a parenting class five weeks before the hearing and did not recall being asked to drug test in February and on prior occasions. He had not consumed alcohol for over a year but could not remember his sobriety date. He knew Eliseo had Marfan syndrome, explaining it had something to do with his valves and heart and his tissues, which were not connecting well, making him weak. He believed he could properly care for him if he were returned to his custody.

Stephanie testified she had a close relationship with the children. She explained Marfan syndrome as a connective tissue disorder and enumerated the many related conditions. She described in detail the daily care Eliseo required and his limitations and identified signs and symptoms of potential cardiac problems. She testified Eliseo had not been officially diagnosed with Marfan syndrome when he was placed in her care. However, a new primary care physician noticed that he had previously been referred to a geneticist and an orthopedic surgeon, but the referrals had expired. She requested new referrals and took Eliseo to a geneticist who made the diagnosis.

County counsel recalled mother and asked her to read into the record a Facebook posting that she shared on her Facebook page on October 3, 2018.² She read the following:

“Anyone else a Mom that doesn’t really like kids? Everyone falls over in shock when I say this, so let me [clarify]. I love my two kids, and a handful of my friend’s kids, but as a general rule, no, I don’t really like children. Having extra kids over my house stresses me out. They’re super needy,

² The reporter’s transcript erroneously states the date of the Facebook post was on October 3, 2019.

messy and get on my nerves the entire time. I prefer the company of adults. I love mine and I enjoy watching them grow up, but I can also tell them when they are being little assholes and to knock it off. I can't tell your kids that jk. I'll tell ur kids to F off, laugh out loud."

Mother said she had never, nor would she ever, say to her children what was shared in the posting and she wanted them to come home.

The juvenile court found the children's special needs and the parents' inability to provide them the supervision and care they required prevented it from returning the children to their custody. The court stated, "Eliseo's [needs] are certainly physically complex because of all of his illnesses and need for constant monitor[ing] and care. Anthony[, Jr.]'s special needs are subtler in the sense that they may not be physically observable at all times, but there are deep seeded emotional problems that are requiring significant counseling and help for him." The court found Xavier "evasive," his progress "minimal" and his understanding and insight lacking as to the difficulty of parenting his children. The court acknowledged mother completed her court-ordered services but found she had not met the case plan objectives, stating "there is significant troubling evidence that the nurturing needs of the children are not [being met] and are unable to be met by [mother]." The court found her Facebook post "disturbing" and "very troubling with regard to her ability to truly nurture two children with special needs." Finally, the court acknowledged the parents' care of the younger sibling but believed adding two more children to the household would "tip the balance" and result in a "disaster for the family."

The juvenile court found it would be detrimental to return the children to parental custody, terminated reunification services and set a section 366.26 hearing for June 27, 2019. Mother and Xavier filed timely notices of intent to file a writ petition.³

³ Mother filed a writ petition, which is pending before this court in case No. F079026.

DISCUSSION

Xavier contends the juvenile court erred in not returning the children to his custody at the 18-month review hearing, given evidence he made substantial progress in his services plan and could safely parent their younger sibling. He further contends the court's failure to afford him even one overnight visit deprived him of the opportunity to demonstrate that he could safely parent the children.

We construe father's writ petition as a challenge to the sufficiency of the evidence to support the juvenile court's finding it would be detrimental to return the children to his custody and to the agency's exercise of its discretion in not advancing visitation to overnight visits. We find no merit to either contention.

The 18-month review hearing generally marks the maximum allowable period of reunification services afforded a parent under the dependency statutes. (§ 361.5, subd. (a)(3)(A).) At that hearing, the juvenile court is required to return the dependent child to parental custody unless the court finds by a preponderance of the evidence that the return of the child would create a substantial risk of detriment to the child's safety, protection, or physical or emotional well-being. (§ 366.22, subd. (a)(1).) A parent's failure to participate regularly and make substantive progress in court-ordered treatment programs is prima facie evidence that return would be detrimental. (*Ibid.*)

If the juvenile court finds it would be detrimental to return the child, it must set a hearing under section 366.26 to select a permanent plan. (§ 366.22, subd. (a)(3).) Section 366.22, subdivision (b), provides exceptions, none of which apply here, that permit the court to continue services. Those exceptions pertain to parents who are residents of a court-ordered substance abuse treatment program; or recently discharged from incarceration, institutionalization, or the custody of the United States Department of Homeland Security; or who were a minor or nonminor dependent parent at the time of the initial hearing. The court must also find the parent is making significant and consistent

progress, there is a substantial probability the child will be returned, and that it is in the child's best interest to continue services to the parent. The court may continue services up to 24 months from the date the child was initially removed from parental custody. (§ 366.22, subd. (b).)

Another possible exception that would allow the juvenile court to continue services beyond the 18-month review hearing is the case where the court finds the parent was not offered or provided reasonable reunification services. (See § 366.22, subd. (a)(3).) However, that issue is not raised in this appeal and appellate courts are divided on the issue. (*In re M.F.* (2019) 32 Cal.App.5th 1, 21.)

On a challenge to the sufficiency of the evidence to support the juvenile court's finding, the question is not whether a contrary finding might have been made, but whether substantial evidence supports the finding made by the court. (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 228.) "The appellant has the burden of showing there is no evidence of a sufficiently substantial nature to support the finding or order." (*Ibid.*) If the finding or order is supported by substantial evidence, it will be upheld. (*Ibid.*)

Here, the juvenile court found Xavier's technical compliance with his services plan was minimal. He was not drug testing as required and had not completed his parenting class. In addition, and more compellingly, he did not understand the nature of his children's special needs and what was required to properly care for them. Eliseo's physical condition was progressive and potentially fatal yet neither Xavier nor mother made any significant effort to educate themselves about his condition or how to care for him. Similarly, they lacked understanding of Anthony, Jr.'s emotional problems so much so that mother denied that he had any problems. On that evidence, the juvenile court could find that returning the children to Xavier's custody would create a substantial risk of detriment to their physical and emotional well-being. Further, the fact that the court returned I.T. to mother's custody, knowing Xavier would share in his care, does not

negate the detriment the other two children would experience in their care. The court believed they could safely parent I.T. because he did not have any special needs but that adding Eliseo and Anthony, Jr., to the household would be a disaster.

As to visitation, we observe as a preliminary matter that Xavier never objected to the agency's decision not to advance him beyond supervised visitation. Ordinarily, a parent's failure to object and bring a matter to the juvenile court's attention results in a forfeiture because it deprives the court the opportunity to correct any error in the first instance. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, superseded by statute on another ground as stated in *In re S.J.* (2008) 167 Cal.App.4th 953, 962.) Because Xavier failed to bring the matter of unsupervised or overnight visitation to the court's attention, we conclude he forfeited the right to now raise it on appeal. In any event, we would find no error. The court granted the agency discretion to advance Xavier and mother to unsupervised visitation. However, there were indications, based on his failure to regularly drug test, that he may be abusing drugs. Consequently, there was no reason to entrust the children to his custody without supervision until he was able to demonstrate that they would be safe. We find no abuse of discretion in the agency's decision to retain supervision over visits.

We conclude substantial evidence supports the juvenile court's finding it would be detrimental to return Anthony, Jr., and Eliseo to Xavier's custody. Further, because Xavier had received more than 18 months of reunification services and there were no exceptions warranting continued services, we affirm the court's orders terminating reunification services and setting a section 366.26 hearing.

DISPOSITION

The petition for extraordinary writ is denied. This court's opinion is final forthwith as to this court pursuant to rule 8.490(b)(2)(A) of the California Rules of Court.